IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL CONFIRMATION CASE No. 8 of 2004
with
CRIMINAL APPEAL No. 1687 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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THE STATE OF GUJARAT - Appellant(s)
Versus
DEVISING DADUBHAI VASAVA - Respondent(s)

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Appearance :

Confirmation Case No.8 of 2004

MR RC KODEKAR, APP for Appellant(s) : 1,
NOTICE SERVED for Respondent(s) : 1,

Criminal Appeal No.1687 of 2004

MR JM PANCHAL for the appellants
MR RC KODEKAR, APP for the respondent

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA
and
HONOURABLE MR.JUSTICE MD SHAH

Date : 03/04/2006

COMMON CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. The appellants, accused No.1-Devising Dadubhai Vasava, accused No.2-Kamlesh Dadubhai Vasava and accused No.3 Dadubhai Devabhaii Vasava of Criminal Appeal No.1687 of 2004 and accused No.4-Sanjay alias Arjun Laljibhai Gami of Sessions Case No.102 of 2003 were tried by the learned Addl. Sessions Judge, (Fast Track Court No.5), Bharuch, for the alleged commission of offences punishable under Sections 396, 12-(B) and 427 of the Indian Penal Code.
2. The accused No.1 has been held guilty under Sec.396 read with Sec.120(B) of IPC as well as under Section 427 of IPC and has been sentenced to death. However, no separate sentence was awarded under Sec.427 of IPC.
3. The accused Nos.2 and 3 have been held guilty under Secs.396 and 427 read with Sec.120(B) of IPC. They have been sentenced to suffer RI for life and fine of Rs.1,000/- in default to suffer S.I. for one month under Sec.396 of IPC and for the offence under Sec.427, R.I. for one year and fine of Rs.500/- in default to suffer S.I. for 15 days. Both these sentences were

ordered to run concurrently.

4. The accused Nos.1,2 and 3 were also ordered to pay compensation of Rs.1,00,000/- each to wife and children of the deceased. All the accused were acquitted of the charge under Sec.135 of Bombay Police Act.

5. Being aggrieved by the aforesaid judgment and order of conviction, the accused Nos.1,2 and 3 have filed Criminal Appeal No.1687 of 2004.

6. The Registry on receiving the record and proceedings of judgment and order of conviction dated 27th August, 2004 in Sessions Case No.102 of 2003 from learned Addl. Sessions Judge (Fast Track Court No.5), Bharuch, for confirmation of death of accused No.1-Devising Dadubhai Vasava as required by Sec.366(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Code" for short) has numbered it as Confirmation Case No.8 of 2004.

7. As both Confirmation Case No.8/2004 and Criminal Appeal No.1687 of 2004 arose from the same judgment and order, they are heard together and are being disposed of by this common judgment.

8. The short facts of the prosecution case are that on 9-2-2003 at about 4.00 p.m. when the complainant and her husband were working in the

field of jowar and one Rajesh Kalidas Vasava was doing some electric wiring work ascending on Bhathiji Maharaj temple, a dispute occurred between husband of the complainant and one Devising Dadubhai Vasava about ascending of electric wire on the temple by Rajesh and thereafter Devising ran away. Thereafter on 11-2-2003 at about 1.00 a.m. when complainant, her husband and children were sleeping, as she heard the sound of knocking by somebody from the front side demanding `bidi' as well as from backside demanding water, she made her husband to wake up. Before they could do anything, people from the back door entered into the room by breaking open the door made of metal sheets. As light was switched on, she identified them as Devising Dadubhai Vasava, Daudbhai Devabhai Vasava, Kamlesh Dadubhai Vasava, Sanjaybhai Villiumbhai Vasava of Kanchanpura, Gatubhai Chunibhai Vasava of Jamigli, Bachubhaii Chandubhai and others. Devising was having sword, Kamlesh and Dadubhai were having dharia, Sanjaybhai of Kanchanpura was having axe, Gatubhai of Jamigli was having spear and Bachubhaii was having axe and they started beating her husband. They also broke the cupboard, robbed the ornaments and also damaged the household articles. As her husband was

given a sword blow on the head by Devising in her presence and in presence of her three children, he fell down and other accused were also beating. Though she shouted for help, no one came to rescue. Meanwhile, her brother-in-law Raysing Vechan Vasava and other villagers came there. The accused ran away brutally killing her husband and committing dacoity. Due to lack of transport facility, they could not inform the police immediately and complaint was lodged by the complainant with Jhagadia Police Station at about 7.00 p.m. on the 11-2-2003 for dacoity and murder of her husband by the accused persons named in the complaint. The complaint was registered by P.I. as Jhagadia Police Station I.C.R.No.17 of 2003 for the offences punishable under Secs. 396, 427, 120 of IPC and Sec.135 of Bombay Police Act and investigation was started. The P.I. went to place of incident, drew inquest panchnama, sent dead body of the deceased for post mortem, drew panchnama of scene of offence, recorded statements of witnesses, arrested the accused during the course of investigation and recovered muddamal by drawing panchnamas and sent to FSL for analysis. On completion of investigation, charge sheet was submitted against the accused. As the case against the

accused was triable exclusively by the Court of Sessions, learned Magistrate committed the case to the Court of Sessions for trial and it was numbered as Sessions Case No.102 of 2003 and transferred to the Court of learned Joint District Judge and Addl. Sessions Judge, Fast Track Court No.5, Bharuch, who framed charge against the accused for offence under Secs.396, 120-B and 427 of IPC as well as under Sec.135 of B.P.Act. The charge was read over and explained to the accused. Accused pleaded not guilty to the said charge and claimed to be tried. Since accused Ravishankar alias Gatu Chunilal Vasava was absconding, trial qua the present appellants was conducted.

9. To prove the charge against the accused, the prosecution examined 27 witnesses namely, Kapilaben Bhudharbhai, the complainant and eye witness to the incident as P.W.1 at Ex.15; Daudbhai Mahmoodbhai as P.W.2 at Ex.17; Zinabhai Bhagabhai as P.W.3 at Ex.20; Raisingbhai Vachanbhai as P.W.4 at Ex.22; Sanjaybhai Bhudharbhai, son of the deceased and another eye witness as P.W.5 at Ex.24; Babubhai Govindbhai as P.W.6 at Ex.25; Dr.Chaulaben Chandrasinh as P.W.7 at Ex.30, Rakeshbhai Thakorebhai as P.W.8 at Ex.32; Gulabhai Gambhirbhai as P.W.9 at Ex.36; Saileshbhai

Dipsingbhai as P.W.10 at Ex.38; Jaswantbhai Mukundbhai as P.W.11 at Ex.39; Khumansing Motibhai as P.W.12 at Ex.41; Rachubhai Chhaganbhai as P.W.13 at Ex.43; Vitthalbhai Ramanbhai Vasava as P.W.14 at Ex.51; Chandubhai Vestabhai as P.W.15 at Ex.54; Ramchandro Jaimal as P.W.16 at Ex.56; Jayendrasinh Dilawarsinh Zala as P.W.17 at Ex.58; Rameshbhai Natwarbhai as P.W.18 at Ex.62; Sureshbhai Anandbhai as P.W.19 at Ex.64; Natubhai Khumanbhai as P.W.20 at Ex.65; Mukeshbhai Maganbhai as P.W.21 at Ex.68; Ashokbhai Bhanubhai as P.W.22 at Ex.69; Mansukhbhai Ratilal as P.W.23 at Ex.71; Rakeshbhai Babulal Moti as P.W.24 at Ex.77; Manharbhai Mathurbhai as P.W.25 at Ex.79; Pradeepsinh Mahendrasinh as P.W.26 at Ex.80 and Umeshbhai (Umangbhai)Chimanbhai as P.W.27 at Ex.82. The prosecution also relied upon various documentary evidence namely, complaint Ex.24; inquest panchnama Ex.26; panchnama of clothes found on the dead body of the deceased Ex.27; arrest-cum-position panchnama of accused Dadubhai, Ravishankar and Kamlesh Ex.28; arrest panchnama of accused Devising Ex.29; map of the place of incident Ex.19; post-mortem note Ex.31; panchnama of the place of incident Ex.33; discovery panchnamas under Sec.27 of the Evidence Act of accused Daudbhai Ex.37, accused

Kamleshbhai Ex.40 and accused Anjun Gamit Ex.42; panchnama of clothes recovered from accused Ex.44; discovery panchnama of accused Devising of the place of incident Ex.52; panchnama of recovery of weapon Ex.55; panchnama of identification of muddamal robbed ornaments, etc. Ex.57; discovery panchnama of muddamal of robbed ornaments Ex.63; panchnama of discovery of weapon Ex.66; arrest panchnama of accused Arjun Gamit Ex.70; discovery panchnama of accused Ravishankar Ex.72; discovery panchnama of muddamal Ex.73; yadi sent to FSL (mobile) for inspection of local place of incident Ex.74; sending list of muddamal Ex.75; copy of notification issued under the Bombay police, Ex.78; identification parade panchnama of accused Arjun Gamit Ex.83; FSL report Ex.76; copy of police station diary Ex.21; copy of FRI of C.R.No.II-31 of 2003 Ex.59; muddamal slips with signature of panchas Exs.34, 35, 45,47, 48, 49, 50 and 53. The defence did not examine any witness.

10. Upon completion of recording the evidence of prosecution witnesses and on receiving the closing purshis, the learned Fast Track Court recorded the further statement of the accused under Sec.313 of the Code of Criminal Procedure qua the incriminating evidence. While pleading

their ignorance and innocence, the accused Nos.1,2 and 3 tendered their written arguments also. Learned APP also tendered the written arguments. Same were taken on record.

11.On appreciation of oral as well as documentary evidence and after hearing the arguments advanced by the learned advocates appearing for the respective parties, the learned Addl. Sessions Judge, (Fast Track Court No.5), Bharuch, held the appellant accused No.1 guilty under Sec.396 read with Sec.120(B) of IPC and awarded capital punishment and sent the matter to the High Court for confirmation under Section 366(1) of the Code. However, no separate sentence was awarded though held guilty under Sec.427 of IPC. This has given rise to the Confirmation Case No.7 of 2004.

12.The appellant accused Nos.2 and 3 were also held guilty under Secs.396 and 427 read with Sec.120(B) of IPC. They were sentenced to suffer RI for life and fine of Rs.1,000/- in default to suffer S.I. for one month under Sec.396 of IPC and to suffer R.I. for one year and fine of Rs.500/- in default to suffer S.I. for 15 days under Sec.427 of IPC. Each of the accused Nos.1,2 and 3 was ordered to pay Rs.1.00 lakhs as compensation to wife and children of the deceased. However, all the

accused were acquitted of the charge under Sec.135 of Bombay Police Act. This has given rise to Criminal Appeal No.1687 of 2004.

13. Heard learned Senior Counsel, Mr.J.M.Panchal for the accused and learned Addl. Public Prosecutor, Mr.R.C.Kodekar, for the State at length.

14. Learned Senior Counsel, Mr.Panchal, after taking us through the relevant oral as well as documentary evidence and reasoned judgment of the court below, submitted that there is considerable delay in filing FIR and no explanation is forthcoming to that effect. According to him, complaint has been filed after giving thoughtful consideration. He further submitted that there is no charge against the appellants and other accused under Secs.143 to 149 or under Sec.302 of IP Code. However, charge framed against them was under Sec.396 read with Sec.120-B as well as under Sec.427 of IPC. According to him, no case under Sec.396 read with Secs.120-B and 427 has been proved by the prosecution against the accused and hence, the appellants are required to be acquitted.

15. In this connection, he took us through the relevant evidence of complainant Kapilaben, wife of the deceased and also of her son

Sanjay, etc. and submitted that even the alleged muddamal ornaments have not been identified by Kapilaben in the Court. On the contrary, it was deposed by her that the ornaments shown to her in the Court as muddamal are not the ornaments belonging to her and since this being a simple incident it has nothing to do with dacoity. Alternatively it was submitted that at the most it can be said to be a case of property damage.

16.Taking us through the FIR Ex.24 and station diary Ex.21 page 112, he submitted that there is contradiction on material point regarding the previous incident took place between the husband of the complainant and the otherside as alleged by the complainant in the FIR and deposed in the Court in as much as the said alleged previous incident has not been stated by her in her deposition before the Court. He also took us through the evidence of aforesaid eye witnesses, Kapilaben and her son, Sanjay together with the evidence of Raisingbhai Vachanbhai, P.W.4 at Ex.22, who is the neighbour of the deceased and Babubhai Govindbhai, P.W.No.6 at Ex.25 who is the brother of the deceased and who came out from his house after the incident. It was further submitted that there are material and important

contradictions, omissions and improvement in the evidence of highly interested witnesses and, therefore, those aspects ought to have taken into consideration by the court below.

17.Taking us through the evidence of Dr.Chaulaben Chandrasinh, P.W.7 at Ex.30, who performed the post-mortem on the body of the deceased along with post-mortem note, Mr.Panchal submitted that even if the say of the prosecution witnesses is believed, then also, injuries received by the deceased, weapons used in the commission of offence and depositions of the eye witnesses are running contrary to each other. It was therefore alternatively submitted that blows alleged to have been given by the assailants were not on the vital part of the body of the deceased which aspect ought to have been considered by the court below. It was further submitted that injuries received by the deceased as described by the doctor in column No.17 of the post mortem report are not possible by way of weapons alleged to have been used by the respective accused. In view of the aforesaid, it was submitted that it is not a case falling under rarest of the rare for awarding capital punishment to accused No.1 and for awarding life imprisonment to accused Nos.2,3 and 4. Since it is a case of mob attack

and since the injuries received by the deceased do not tally with the weapons alleged to have been used and when prosecution has not been able to prove the menace on the society, the appellants ought to have been acquitted. He has placed reliance upon the judgment relied on by his counterpart into the court below along with other judgments and discussed in the judgment by the court below.

18. Learned Addl. Public Prosecutor, Mr.R.C.Kodekar, took us through oral evidence of eye witnesses together with the evidence of supporting witness, Raisingbhai Vachanbhai, the neighbour who has been examined as P.W.4 at Ex.22. According to him, prosecution is able to prove the case beyond reasonable doubt against the accused. Showing the evidence of Babubhai Govindbhai, who has been examined as P.W.No.6 at Ex.25, learned APP submitted that though he is a hostile witness, he being the real brother of the deceased did not come out for rescuing the deceased and his family members due to terrorized situation having created by the accused by brutally killing husband of the complainant at midnight in her presence and in presence of her three children. If the evidence of this hostile witness is looked into, it can be seen that till he came for deposing before

the Court, he and other witnesses have been controlled by the accused and hence, it has been submitted that this aspect of evidence may be kept in mind by the court while evaluating the evidence on record. He also took us through indirect circumstances such as evidence of Dr.Chaulaben Chandrasinh, P.W.7 Ex.30 who performed post mortem on the body of the deceased, FSL report page 238, muddamal article 19 together with discovery panchnama Ex.55 and submitted that weapons alleged to have been in the hands of accused were bearing bloodstain marks of the group of the deceased. He also took us through arrest panchnama of Sanjay along with TI parade panchnama page 258. It was further submitted that scene of offence has been shown by the accused and as per Sec.8 of the Evidence Act, it can be considered as one of the conduct of the accused. Moreover, during the course of TI parade, accused have been identified by the complainant and witnesses. He also took us through injury No.1 and submitted that there are ample evidence to connect the appellants with the crime in question apart from the evidence of eye witnesses and other witnesses including indirect circumstances. It was further submitted that appellants and other accused are head strong persons in the society

and they entered into the house of the deceased at midnight by breaking open the doors with deadly weapons and brutally killed the husband of the complainant in front of her and her three children. Not only that, valuable ornaments were robbed by breaking open the cupboards and whole house has been damaged. Moreover, while leaving, they broke the petrol tank of the motor cycle also. By all these misdeeds, their intention was to have control on the deceased and villagers so as to see that nobody is contacted for help or for informing the police in time. According to him, it is a case of dacoity with murder and since the Court below has rightly dealt with the same, it does not require any interference. No much submission has been advanced by him on the point of capital punishment.

19. We have gone through oral as well as documentary evidence which have been shown to us by the learned counsel for the respective parties as well as reasoned judgment delivered by the court below. We are evaluating the same one by one minutely after giving thoughtful consideration of the submissions made by the learned counsel appearing for the respective parties.

20. The first witness examined by the prosecution

is the complainant, Kapilaben, who is the wife of the deceased at Ex.15. According to her, she was present in her house at midnight along with her husband Bhodarbhai and three children when the incident took place. She has deposed that at midnight when they were sleeping in the house, she heard the sound of somebody demanding 'bidi' from the front door and water from back door of his house and therefore, she made her husband to wake up and before they do anything, accused and other persons entered through back door with deadly weapons after breaking open the door. Out of them, she could identify six persons and their names have been given in her deposition as Devising, Kamlesh, Daud, Bachu, Gatu and Sanjay. She has also described regarding the weapons held by them along with their role by stating that all of them were having deadly weapons in their hands and gave blows on her husband and brutally killed her husband in presence of her and her children. She has also deposed that they also broke the cupboard and robbed valuable ornaments etc. and also damaged their shop which is part of their house. They also damaged the petrol tank of the motor cycle and thereafter ran away. She has further deposed that out of six persons, Devisingh, Daud and

Kamlesh belong to their Village and three persons in the neighbouring Village and therefore, she could identify all the six persons as they were frequenting the village. She has fairly deposed in her examination-in-chief that except six persons, she could not identify other persons. She has also deposed that as she did not get any vehicle, she could not file the complaint in time and, therefore, in the morning she went to the Police Station along with other people and accordingly lodged the complaint Ex.24. As far as motive is concerned, she has deposed in her examination-in-chief that she does not know as to why the incident has taken place. It is required to be noted that she could not identify the ornaments or it can be said that she has denied that the ornaments shown to her in the Court were not belonging to her. She has stated in her cross examination that though she shouted for help, nobody turned up. She has categorically stated that the person named Sanjay in the complaint was of Kanchanpura and not the Sanjay of Songadh. To certain questions put to her about the minor contradictions in the FIR and her evidence before the Court, she has stated that it is because of she being an illiterate lady.

21.Another important witness examined by the

prosecution is Sanjay Bhodarbhai, son of the deceased and eye witness as P.W.No.5 at Ex.24. Before recording the evidence of this witness, the Court has ascertained his age, seriousness of the matter and his ability to depose. He has stated in his deposition that everybody in the family were present in the house when the incident took place. He has categorically deposed and supported the say of his mother. It reflects from paragraph 2 of his evidence that the persons who entered into their house by breaking open the door and beaten his father were having deadly weapons namely, sword, axe, spear, gupti, etc. He has further deposed that Devising gave sword blow on the head of his father and hence, his father fell down and Bachiya and Kamlesh gave axe blows. He has identified three persons present in Court as Devising, Kamlesh and Daud. He has also deposed that after the incident police has recorded his statement. Since there were minor contradictions in his police statement, the otherside has tried to establish by way of cross examination wherein he has admitted that he has not stated to the police that Kamlesh was having axe in his hand. It has also been deposed that during the course of incident, neighbours did not come to their rescue. On a

question as to whether any conversation took place between his father and mother, he has stated that no conversation had taken place between them. He has also deposed regarding the robbery and damage caused to the properties. He has stuck to his version in his cross examination also. As far as identification of the persons is concerned, it has come out from his cross examination in paragraph 7 that as the light was on in the house at the time of incident, he was able to identify the accused. In shortd, just like his mother, he has supported the say of the prosecution in toto.

22.The prosecution has also examined Raising, the neighbour, as P.W.No.4 at Ex.22. According to him, at the time of incident, he was in his house and when reached there, he saw the accused along with other people and could identify Devisingh, Kamlesh, Daud, Bachiyo, Gatu and Sanjay. He has identified three persons namely, Devising, Kamlesh and Daud present in the Court as the persons seen along with other accused at the place of incident. He has deposed that after the accused ran away, he went into the house of Bhodarbhai where he saw Bhodarbhai was killed by those persons and his family members namely, Kapilaben, Sanjay and two daughters crying. He has also deposed that

he has identified all the persons who were coming out from the house of Bhodarbhai with the help of light. In his cross examination, he has admitted that at the time of incident, he was in deep sleep at his residence and because of noise, he got up and came out of the house. The court has asked some questions to this witness and it has been established that he was threatened by the accused and also restrained from going and deposing before the Court. During the court questions also, he has categorically deposed having seen the accused coming out of the house of the deceased because of presence of light.

23. Babubhai Govindbhai, who has examined as P.W.No.6 at Ex.25 has not supported the prosecution version and has been declared as hostile.

24. Dr.Chaulaben Chandrasinh Gadhiya, who has been examined as P.W.No.7 at Ex.30, has deposed on 11-2-2003 that she was serving as Medical Officer in Welfare Hospital and Community Health Centre, Jahagadia, District Bharuch and she received dead body of one Bhodarbhai Govindbhai for post mortem at 10.30 a.m. After conducting post mortem she prepared post mortem note Ex.31. She has deposed that on external examination, she found the following injuries

as mentioned in Column No.17 of the post mortem note reproduced at page 146 of the paper book:

(1)One incised wound tnt over Rt. Temporal scalp linear in shape, about 2 inch long and 1 inch broad. Marging clean cut. This would leads to # (multiple) of Rt. Temporal bone direction diagonally towards the Rt. Ear.

(2)One incised wound over Rt. upper back C is spindled shaped & 1 ½ inch long & 1 inch broad clean cut margins, directed towards the Rt. Upper arm.

(3)Two parallel incised wound linear in shape, one about 2½ inch in length and half cm broad c sharp cutting margins starting from outer & lower aspect of Rt. Ankle jt. up to the sole. Second parallel to & below the previous around about 2 inch in length and half cm broad. Bruises tnt on Rt. Upper arm & on Lt. Side of chest & on Lt. Knee it. Abrasions tnt over Rt. Elbow it Lt. Lover arm & on Lt. dorsum of foot."

She has deposed as having found the following external marks of injuries as mentioned in column No.19 of post-mortem note at page 147. She has opined the cause of death in column No.23 as "severe intra-cranial haemorrhage due to multiple # of Rt. temporal bone". She has

categorically deposed after seeing the muddamal article 21 sword that the injury received by the deceased on right temporal bone direction diagonally towards the right ear is possible by way of this muddamal article sword. She has categorically deposed in her cross examination that she is not able to say as to when lastly deceased has taken food because his stomach was empty. She has also admitted that the process of rigor motis was started. In short, through her, prosecution could establish external and internal marks of injuries as well as cause of death. It is also established that injury No.1 is possible by way of sword.

25.It has been established that P.W.No.1 Kapilaben and P.W.No.5 Sanjay are wife and son respectively of the deceased and were there in the house along with deceased and two daughters. It is required to be noted that incident in question has taken place at midnight and, therefore, presence of these witnesses in their house is quite natural unless otherwise proved and, therefore, their presence at the time of incident cannot be doubted and they are the eye witnesses. Their presence is further established from the fact that they are family members of the deceased and incident incidentally has taken place in

the house of the deceased at midnight and which has been established even by way of inquest panchnama, panchnama of scene of offence, etc. We have also given considerable thought to their evidence keeping in mind that they are the nearest relatives of the deceased and also the fact that incident has taken place in four corners of the house at midnight where the situation was such that even neighbour including brother of the deceased and others could not come out of their house for rescuing the deceased and his family members. In these circumstances, we cannot demand any independent witnesses for the incident in question looking to the nature of the incident and time and place of the incident. Then comes the question as to whether their evidence are trustworthy, reliable and free from doubts and if so, Court can certainly rely upon the same and base conviction. Keeping in mind above aspects of the matter, we have evaluated the evidence on record. It is true that eye witnesses are nearest relatives of the deceased. However, keeping in mind time, place and nature of incident, their presence was natural. If others were present there as eye witnesses then, their presence can raise doubt in the mind of the Court and, therefore, merely because witnesses

are relatives of the deceased, we cannot discard their evidence as being interested witnesses. The evidence of aforesaid witnesses supported by the evidence of Dr.Chaulaben who performed post-mortem on the body of the deceased totally proved the case of the prosecution. On going through the evidence of aforesaid eye witnesses and also on considering all aspects of the matter, we are of the opinion that their presence was quite natural. As stated earlier, looking to the time and place of incident, there cannot any other person in the house other than the family members.

26. On an evaluation of the circumstances narrated hereinabove, we believe that their evidence are trustworthy, reliable and free from doubts and nothing contrary has come out from their cross examination except formal contradictions. It is established that all the six accused entered into the house with deadly weapons by breaking open the back door. The weapons held by the accused has also been proved with their respective role. As the lights were on, three accused could be identified as belonging to their Village and three accused from neighbouring Village and since they had an earlier opportunity to meet each of the

accused, question of misidentification also does not arise. In these circumstances, we believe their evidence in toto. It is true that witness Sanjay was aged about 15 at the relevant and hence, on satisfying about his ability of giving deposition, his evidence was recorded.

27. It is to be borne in mind that victim and witnesses are from tribal community of the State of Gujarat and the complainant widow is an illiterate lady. We have also kept in mind the fact that initially when she entered into the Court, she could not depose because of the high-handed action on the part of the otherside and ultimately special order has to be passed by the court for enabling her to depose before the Court. Considering the continuous threat being faced by the witnesses from the otherside till the evidence was recorded and also considering the period between recording of evidence and incident of about one year, there are chances of some minor contradictions occurring. In these circumstances, if any minor discrepancy is there, it is required to be ignored keeping in mind other relevant factors which have been established by the prosecution. Keeping in mind all the above aspects, Court should evaluate the evidence and court below

has rightly done the same and we also share the same view.

28.A contention has been raised by the learned counsel appearing on behalf of the accused into the court below as well as this Court that complaint in question has been lodged by the complainant in the morning. It is true that complaint has been lodged in the morning. This contention has been dealt with by the court below in detail and we also accept the same. Keeping in mind the distance of 10 kms. between the place of incident and the Police Station and other aspects such as the incident has taken place at midnight in a small Village consisting of 500-600 people where due to non-availability of vehicle, they could not go to the Police Station at midnight and, therefore, at the earliest she went to the Police Station and lodged the complainant narrating all the facts in detail including the names of the assailants, deadly weapons carried by them and their devil acts. In these circumstances, it cannot be said that there is a delay in filing FIR as at the earliest opportunity complaint has been filed and, therefore, we are unable to accept the arguments advanced by the learned counsel for the appellants that there is a delay in filing FIR. We are of the view that

delay is properly and satisfactorily explained.

29. Prosecution case is further supported by the evidence of P.W.No.4, Raisingh, who is the neighbour and who has identified the accused into the court below along with the complainant and his son. Not only that, even during test identification parade also, the accused were identified by this witness including the complainant and hence, we are not in a position to accept the arguments of the learned counsel for the appellants that the accused have been falsely involved into the crime in question.

30. As regards motive, it has been established from the incident itself that it is a case of dacoity with murder. Once it is so established then, onus of proving motive does not arise. Since it is a clear case of dacoity with murder, it has nothing to do with the incident that happened prior to the incident in question during the day in the temple as stated by the complainant in the FIR. In this view of the matter, there is no question of proving the other aspects or motive. The court below has also dealt with the same in its reasoned judgment and we also share the same view.

31. It was also the contention raised by the learned counsel for the appellants that injury, weapons and deposition run contrary to

each other. It may be noted in this regard that the incident has taken place in a group and deceased was surrounded by the assailants and the situation was such that the complainant being wife of the deceased with three children would not be in a position to see the incident minutely because of painful act of the assailants and hence, if there is some minor contradictions in stating as to who has given which blow on which part of the body of the deceased, it is required to be evaluated keeping in mind the aforesaid circumstances. Facts remain that deceased received multiple injuries practically on all parts of the body including multiple fracture of scalp apart from other injuries. Prosecution also gets support from FSL report regarding the articles which were having blood stain marks matching with the group of the deceased, panchnama of scene of offence, discovery panchnama whereby weapons have been produced by the accused, the test identification parade by way of evidence of Executive Magistrate whereby the complainant and other witnesses have identified all the accused including the fact that scene of offence has been shown by the accused.

32. Having regard to the aforesaid, we are of the view that prosecution is able to establish that

the incident has been taken place at midnight in the house of deceased and the accused entered into the house with deadly weapons by breaking open the back door and brutally killed the deceased in the presence of the complainant i.e. wife and three children of the deceased. It is also established that the accused broke open the safe and robbed valuable ornaments and articles. They also damaged other properties of the deceased including roof of the house. They even damaged petrol tank of the motor cycle of the deceased creating such a situation that after they ran away from the scene of offence, the complainant and others would not get any help from anybody so as to reach the police or others as the distance between the place of incident and the Police Station is about 10 kms. Even his real brother could not dare to come to their rescue from which one can ascertain the seriousness of the offence and the furious situation having created by the accused persons while committing dacoity and murder.

33. In view of the aforesaid discussion, we are of the opinion that prosecution has proved the case against the appellants and others beyond reasonable doubt.

34. As far as sentence is concerned, court below

has awarded capital punishment to accused No.1-Devising Dadubhai Vasava and for which, court below has dealt with and discussed the same in paragraph No.56 onwards of the judgment after considering various judgments and evidence on record. It was held that act of the accused No.1 is an act of heinous crime falling under the principle of rarest of rare case requiring awarding capital punishment under Sec.397 of IPC. It was further held that keeping in mind all the facts and circumstances, capital punishment is the exception and imprisonment for life is the rule when a person is found to be guilty to have committed offence under Sec.396 of IPC.

35.We have also considered all aspects of the matter and have also gone through the reasons assigned by the court below in awarding capital sentence to accused No.1 and life imprisonment to accused No.2-Kamlesh Dadubhai Vasava and accused No.3 Dadubhai Devabhaii Vasava and we are of the opinion that prosecution has failed to establish that act of the accused No.1 can be said to be causing menace to the society warranting imposition of capital punishment. Reliance is placed on a decision of the Apex Court reported in 2005 Supreme Court Cases (Cri) 1516 in the case of Rahul alias Rao Saheb

Vs. State of Maharashtra. In view of the above, judgment delivered by the court below qua the accused No.1 is required to be partly set aside and capital punishment is required to be converted into life imprisonment.

36.As regards punishment awarded to the accused Nos.2 and 3 is concerned, as discussed earlier, prosecution is able to prove the case against the appellants accused and minimum sentence prescribed is imprisonment for life. We therefore pass the following order:

The appeal is partly allowed. Conviction of the appellant-accused No.1 under Sec.396 read with Section 120(B) of IP Code vide judgment and order dated 27th August, 2004 in Sessions Case No.102 of 2003 by the learned Addl. Sessions Judge, (Fast Track Court No.5), Bharuch awarding death sentence is set aside and he is sentenced to suffer rigorous imprisonment for life and a fine of Rs.1,000/- in default to suffer S.I. for one month and for the offence under Sec.427 of IPC, he is sentenced to suffer R.I. for one year and to pay a fine of Rs.500/- in default to suffer SI for 15 days. The conviction of the appellants-accused Nos.2 and 3 are hereby confirmed. Rest of the order regarding fine, etc. awarded by the court below remains unaltered. Reference

made by the learned Sessions Judge under Sec.366(1) of the Code for confirmation of death sentence is decided accordingly.

37.Office to place a copy of this judgment in each matter.

(R.P.DHOLAKIA,J.)

(M.D.SHAH, J.)

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